Supreme Court of the United States.

OCTOBER TERM, 1942.

HELEN SEARS BRADLEY ET AL.,
Petitioners,

v.

WILLIAM M. WELCH, FORMER COLLECTOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The distinction between an illusory trust by which "the grantor" re-routes his own income from his own property among his family group, and a trust where tenants in common establish a trust of their several properties, is well illustrated by an opinion of the Committee on Appeals and Review in 1921, before Section 166 had been enacted—5 C.B. (1921), p. 184.

The heirs of an intestate had joined in the creation of a trust of their inheritance which was irrevocable except by joint consent. The opinion was:

> "The trust instrument in this case is revocable, but it must be remembered that the action of all the grantors must coincide. It is not possible for any one

> of them by his own act to repossess himself of the property and assert the complete ownership and control of his portion of it, as is true in the case where there is but a single grantor. He must persuade all of the other grantors—who in this case are also beneficiaries under the trust instrument and might be adversely affected by such revocation or amendment—to consent to the revocation. . . . Since, therefore, it is impossible for any one of the grantors to assert ownership over his portion of the property by his own act, it seems wrong in principle to tax him individually on the income from that portion of the property on the authority of a regulation which has ownership as its basis. It is concluded that the income from the A estate trust in so far as it is to be accumulated should not be taxed to the grantors."

To hold, as the Circuit Court does, that such a trust is revocable at the will of any one of the grantors, if they are a friendly family, because the power to persuade the others enjoyed by each of the friendly grantors is a "power to revest" under Section 166, unless the others have a "substantial adverse interest" in the sense of a personal special or hostile interest not enjoyed by each of the others reciprocally, would lead inevitably to the destruction of genuine family trusts.

"Power to revest" under Section 166 means a power expressed in the trust instrument. It does not mean a power in one of the grantor-beneficiaries to control, intimidate, persuade or entice the others. Nobody before this case has ever suggested that it does.

The grantor-beneficiaries are the sole beneficiaries of the trust, enjoying the benefit of a single ownership of the legal titles instead of their former ownership in common.

The chance that one of them may persuade or coerce the other is not a "power to revest."

Section 166 by its very terms does not apply to this trust. It applies to "the grantor" who has "power to revest" in himself title to the corpus. It does not apply to two or more owners of property who put their property into a trust.

No decision before this one has suggested that if a court by "realistic appraisal" thinks that one of such grantors has such family ascendancy that the others will probably not oppose, the trust is revocable. Revocable by whom? Section 166 provides that it is revocable by "the grantor." Does this mean that it may be revoked by any one of the grantor-beneficiaries? If it requires that those who joined in granting also join in revoking, then it requires joint action of all, any one of whom may refuse for any reason whatever or for no reason at all. It is beside the point to suggest that no one may effectively refuse unless he can prove a substantial pecuniary interest in keeping the trust as it is.

In this respect the case is in conflict with

> *Stuart* v. *Commissioner,* 124 Fed. (2d) 772 (C.C.A. 7th),

which asserts the distinction between the recapture by the sole grantor of the corpus of the trust "by virtue of the future exercise of his influence" and its recapture by virtue of a power reserved in the trust instrument.

Evidently the court below was influenced by the remarks in *Helvering* v. *Clifford,* 309 U.S. 331, about "the normal consequences of family solidarity" and hence has assumed that the mother would have been able to persuade the daughter to terminate the trust, hence that the mother had "power to revest" her two-thirds in herself.

If we assume that the mother was dominant and could persuade the daughter to terminate the trust, then it must follow that the daughter was not dominant and would be unable to persuade her mother. It follows that the trust is revocable as to one grantor's share but not as to the other's.

The clear answer is that Section 166 has nothing to do with this trust.

Respectfully submitted,

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